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Nos. 73-300 and 73-480

# Supreme Court of the United States

## OCTOBER TERM, 1973

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.,
*Petitioners,*

v.

ROBERT BUSTOS, ET AL.

CRISTOBAL CARDONA, ET AL.,
*Petitioners,*

v.

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.

**On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus curiae*, in support of the position of the plaintiffs below (cross petitioners and respondents here), is filed by the American Federation of Labor and Congress of Industrial Organizations with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

### INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 111 national and international labor unions having a total membership of approximately 14,000,000 working men and women. The

plaintiffs below in this case are members of the United Farm Workers of America, AFL-CIO. Moreover, the AFL-CIO or its affiliates have been parties to the three prior cases in which the Attorney General's practice of allowing the class of aliens commonly called commuters to freely enter this country has been challenged: *Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 114 (D.D.C.); *Texas State AFL-CIO* v. *Kennedy*, 330 F.2d 217 (C.A.D.C.); *Gooch* v. *Clark*, 433 F.2d 74 (C.A. 9) cert. denied 402 U.S. 995.

The labor movement's interest in and concern over the commuter practice is readily explained. During the last ten years a number of statistical studies have been made as to the economic effect of this practice. The data thus amassed are set out at 115 Cong. Rec. 7731-7742 (1969) and may be briefly summarized as follows. Each year some 40,000 commuters enter this country from Mexico to work in southern Texas, Arizona and California. (115 Cong. Rec. 7736.) The bulk of them enter to take unskilled blue-collar jobs; roughly 40% are farm workers, 9% are laborers, 7% are maids and 6% are hotel and restaurant employees. (115 Cong. Rec. 7738.) These commuters comprise a substantial portion of the workers employed in the border area: they make up 23% of the Brownsville, Texas' total labor force, 17% of El Paso's and 5% of San Diego's. (115 Cong. Rec. 7733.) The border areas consistently show a higher unemployment rate than the remaining portions of Texas, Arizona and California. In the first 6 months of 1967, for example, none of the 13 border areas had a lower unemployment rate than the average for the state, and 7 of them, all in Texas, had an unemployment rate of twice the state-wide average. In border cities such as Laredo, Texas and El Centro, California, unemployment rates exceeding 10% are common. (115 Cong. Rec. 7739.)



As is to be expected in an area of such high unemployment, border wages are low; "industry by industry, county by county, the pattern is the same—earnings in border areas are lower than average earnings in the State." (115 Cong. Rec. 7740.) In Imperial County, Calif., the average weekly nonfarm wage is $20 less than the state average. In Santa Cruz County, Arizona, it is $29 less than the state average. In 9 Texas border counties "it is at least $25 less, and often more." (*Id.*)

Commuters are a major causitive factor of the adverse situation facing domestic workers in border areas. For example, a 1961 Department of Labor survey of Laredo and El Paso, Texas showed that "a large number of unemployed American workers had the same occupational skills as the employed alien commuters." In one instance two garment firms employed 88 commuters as sewing machine operators. At this same time, the files of the "Texas Employment Commission contained applications from 156 unemployed American workers with the same occupation." (115 Cong. Rec. 7733, 7740.) The survey also found that the wages paid by firms employing only American workers were 38% higher than those paid by firms employing alien commuters and that "there were cases where a single firm employing both commuters and Americans would pay the commuters less than the Americans similarly employed." (115 Cong. Rec. 7740.) Thus, as Senator Walter Mondale pointed out:

> "[M]exican aliens, as a group, serve as a readily available low-wage work force which undermines the standards workers generally enjoy throughout the rest of the United States. As a result, the forces of free enterprise are prevented from operating to devlop standards along the border commensurate with normal

> American standards * * * [T]heir employment in this country is clearly detrimental to the economic conditions, the job opportunities, and the organizing and collective bargaining efforts of American workers, because they have little or no stake in the resolution of domestic labor disputes. Indeed, it is clear that these nonresident commuters, as well as illegal entrants, are widely used as strikebreakers." (115 Cong. Rec. 7742.)

The basis upon which the AFL-CIO determined to state its views to this Court is equally straightforward. We agree with the points made in the thorough and painstaking brief filed in this Court by the plaintiffs below. That brief, however, places its main reliance on the 1965 amendments to the Immigration and Nationality Act of 1952, rather than on the modifications to the prior law made in the Act itself. It is our view that what Congress did in 1952, standing alone, requires judicial disapproval of the commuter practice. That, too, was the conclusion of Judge Eugene Wright in his dissent in *Gooch* v. *Clark, supra,* 433 F.2d at 82-88. The argument we develop herein is therefore devoted to an exposition of the conclusions to be drawn from the 1952 Act. The focus of that discussion will be Judge Wright's closely reasoned dissent in *Gooch,* the substance of which, we submit, warrants adoption by this Court.

## ARGUMENT

Congress, in the Immigration and Nationality Act of 1952, as amended, has stated the rules governing the entry of "aliens"[1] into the United States. That Act "charge[s] * * * the Attorney General * * * with the administration and enforcement" of those rules. (8 USC § 1103.) In fulfilling that charge the Attorney General is, of course, obliged to conform his actions to the rules Congress has mandated. We shall now demonstrate that the Attorney General has failed that obligation by permitting entry of a class of aliens, commonly called "commuters," that the Act renders ineligible for admission.[2]

1. We begin that demonstration by considering the language and structure of the Act. A "commuter" is an alien whose sole permanent residence is in Mexico or Canada and who is permitted by the Attorney General to enter the United States to work in this country on a daily or seasonal basis as an "immigrant"[3] exempt from the valid unexpired visa requirement imposed by 8 U.S.C. § 1181(a).[4] The sole

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[1] "Any person not a citizen or national of the United States." (8 U.S.C. § 1101(a)(3).)

[2] "According to an I. & N.S. survey, most commuters who enter the United States are farmworkers, general laborers, or domestics, all of whom are in competition with petitioners. *See* 115 Cong.Rec. 7737-7738 (1969). At the present time the Secretary of Labor will not certify that such workers are in short supply in the United States, or that the admission of aliens for such purposes will not adversely affect wages and working conditions here. 29 C.F.R. § 60(a)(2) (1970). Hence under § 1182(a)(14) of the Act, such aliens are ineligible for visas as special immigrants. Unless they can enter without a visa as commuters, therefore, they cannot enter the United States at all. (Skilled workers, whose trades are in short supply in this country, have no difficulty obtaining visas as special immigrants; elimination of the commuter status would make no difference to them.)" *Gooch* v. *Clark,* 433 F.2d 74, 82 (C.A.9) cert. denied 402 U.S. 995 (Eugene Wright, J., dissenting).

[3] "Every alien except an alien who is within one of [12 enumerated] classes of non-immigrant aliens." (8 U.S.C. § 1101(a)(15).)

[4] "Except as provided in subsection (b) of this section no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such visa of the accompanying parent * * *." (8 U.S.C. § 1181(a).)

exception to the documentation requirement of §1181(a) is that

> "returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation." (8 U.S.C. § 1181(b).)[5]

Thus, the *only* immigrants lacking a valid unexpired visa the Attorney General is authorized to admit into this country are "returning resident immigrants defined in section 1101(a)(21)(B)." For the Attorney General to prevail here he must therefore establish that a commuter, who by definition has his sole permanent residence in Mexico or Canada, and who enters the United States solely to work is a "returning [United States] resident." Given the utter incongruity of that conclusion on its face it is not surprising that the Attorney General can not do so.

The definition of the term "returning resident immigrants" to which the §1181(b) exception is keyed is:

> "An immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." (8 U.S.C. § 1101(a)(27)(B).)

That section, by its use of the phrase "lawfully admitted for permanent residence," in turn incorporates by reference 8 U.S.C. § 1101(a)(2). For, "Section 1101(a)(20) defines precisely the term 'lawfully admitted for permanent residence.' This term has especial significance because of its application to numerous provisions of the bill." (H. Rep. 1365, 82nd Cong., 2nd Sess., p. 32.) Section 1101(a)(20) states:

> "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."

Insofar as he treats with the language of the Act at all, the Attorney General rests his case on the following reading of § 1101(a)(20):

> "Upon lawful admission as an immigrant, an alien acquires a *status* which gives him the *privilege* of residing permanently in the United States. So long as that status is not changed, the alien who has been lawfully admitted for permanent residence retains the privilege of establishing a permanent residence in this country.[15] • • • [A]s the Ninth Circuit correctly observed in *Gooch* v. *Clark*, *supra*, 433 F.2d at 79, the reservation in 8 U.S.C. 1101(a)(20) concerning 'such status not having changed' refers primarily to the change of status from that of an immigrant lawfully admitted for permanent residence to that of a nonimmigrant, pursuant to 8 U.S.C. 1257. *See Matter of S.*, 6 I&N Dec. 392 (Attorney General); *Matter of M.P.*, 9 I&N Dec. 747. Lawful residence status may also be lost if the returning immigrant reenters surreptitiously. *Matter of M.*, 5 I&N Dec. 642. And an alien with

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[5] From 1952 until 1965 § 1181(b) provided for informal readmission of "aliens lawfully admitted for permanent residence who depart from the United States temporarily." It is our view that this change in language need not be accorded significance for the plaintiffs below to prevail here. For, from 1952 until 1965, as today, the crux of this case is the proper construction of the term "lawfully admitted for permanent residence." (See pp. 7-15, *infra*.) While we do not develop the point we note, however, that the plaintiffs below have argued throughout that this change does provide support for the proposition that the Attorney General's action in permitting commuters to enter the United States controvenes the Act.

lawful residence status may be refused readmission if his reentry is barred on a substantive ground specified in the statute. *United States ex rel. Claussen* v. *Day*, 279 U.S. 398; *United States ex rel. Karpay* v. *Uhl*, 70 F.2d 792 (C.A. 2). But there is no basis in the statutory language or purpose for an assumption that status as an immigrant lawfully admitted for permanent residence is lost or abandoned by failure to establish a home in the United States.

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"[15] Since the commuter's status is tied to continued employment in this country, it has been the administrative view that such status is lost if the commuter is out of such employment for a period of six months, unless the unemployment was caused by uncontrollable circumstances, such as serious illness, disabling injury, or pregnancy. *Matter of D.C.*, 3 I&N Dec. 519; *Matter of L.*, 4 I&N Dec. 454 (1951); *Matter of Burciaga-Salcedo*, 11 I&N Dec. 665 (1966); *Matter of M.D.S.*, 8 I&N Dec. 209; *Matter of Wighton*, 13 I&N Dec. 683."

(Fed. Parties Br. pp. 25-26; emphasis in original.)

In other words, the Attorney General argues that the issuance of a valid visa to an alien creates in that individual a lifetime status as an immigrant "lawfully admitted for permanent residence" (within the meaning of § 1101 (a)(20)) which is subject to forfeiture on the limited grounds stated in his brief but not on the ground that the immigrant has not established or maintained a permanent residence in the United States.

This argument suffers from two fatal flaws. First, while it is pressed for the purpose of this litigation, it is inconsistent with the Attorney General's original understanding. In his dissent in *Gooch v. Clark*, Judge Wright traced the evolution of the Attorney General's efforts to provide a rationale for the commuter practice. For the Court's convenience we set out that portion of his opinion in the margin.[6]



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[6]

"I think it important to point out that we are not presented here with any consistent or coherent interpretation of the sort to which courts have traditionally deferred. *Cf.* Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315, 53 S.Ct. 350, 77 L.Ed. 796 (1933). Indeed, to the extent that the Service has in the past advanced any consistent interpretation of the Immigration Act, that interpretation has been directly in conflict with the Service's position in this case.

"It is of course true that the Service has since 1952 continued to admit commuters to the United States without requiring entry visas. But the Service itself has admitted that the real basis of the practice is not statutory command but administrative fiat:

> 'The commuter situation *manifestly does not fit into any precise category found in the immigration statutes.* The status is an artificial one, predicted upon good international relations maintained and cherished between friendly neighbors.'

Matter of M—D—S— et al., 8 I. & N. Dec. 209, 213 (1958) (emphasis supplied).

"Nor has the Service sought to legitimize this essentially lawless position by regulations describing and controlling the operations of the commuter system. Prior to 1952, of course, such regulations existed. But they were repealed upon passage of the Immigration Act and never again republished—eloquent testimony, in and of itself, to rebut the Service's current view that Congress in 1952 intended no change in the commuter practice.

"Despite the absence of regulations, however, commuters continued to cross the border freely. The Service took the position that the 1952 Act had not disturbed 'the practice of considering commuters as permanent residents,' and relied on the 'fiction of a commuter's permanent United States residence coinciding with his place of employment.' Matter of H— O—, 5 I. & N. Dec. 716, 718-19 & n. 13 (1954).

"This position was formalized in a regulation issued in 1957 which, with changes not material here, remained in force until 1966. It read as follows:

> '§ 211.1 Visas. A valid, unexpired immigrant visa shall be presented by each arriving immigrant alien except an immigrant who (a) was born subsequent to the issuance of an immigrant visa to his accompanying parent and applies for admission during the validity of such visa, or (b) *is returning to an unrelinquished lawful permanent residence* after a temporary absence abroad (1) not ex-

As Judge Wright demonstrates, the Attorney General, contrary to his present argument, initially recognized that an immigrant's "abandon[ment of] his status of a permanent resident in the United States" does render that immigrant inadmissible "without again qualifying for admission as a permanent resident." (*Matter of M-D-S- et al.*, 8 I.&N. Dec. 209.) But he sought to escape the force of that recognition by adoption of the fiction that maintenance of permanent employment in the United States is sufficient to pre-

ceeding one year and present a Form 1-151 alien registration receipt card duly issued to him, or (2) presents a valid unexpired re-entry permit duly issued to him, or (3) satisfies the district director in charge of the port of entry that there is good cause for the failure to present the required document, in which case an application for waiver shall be made on Form I-193.'

22 Fed.Reg. 6377 (1957) (emphasis supplied).

"The regulation is plainly inconsistent with the Service's present position. It clearly forbids the entry without a valid or re-entry permit of any immigrant not returning to an 'unrelinquished lawful permanent residence' in the United States, and thus makes the privilege of using a Form I-151 to gain entry dependent upon actual residence in the United States. It is compatible with the commuter practice, which continued during the years 1957-66, only on the assumption, apparently made by the Service, that a commuter's place of employment constitutes an unrelinquished lawful permanent residence in the United States.

"The same view of the Act was taken by the Service in the 1958 decision in Matter of M— D— S—, et al., *supra*. That was an appeal by the District Director from a finding by the Special Inquiry Officer that certain alien commuters had been improperly excluded. The aliens had been issued immigrant visas, had used them to acquire Forms I-151, and had until a little more than six months previously been employed in the United States and admitted as commuters. When they sought to gain entry into the United States, they presented their still valid Forms I-151. The District Directors, however, excluded them on the grounds that they could not claim commuter status if they had had no United States employment for six months previously.

"The Special Inquiry Officer, adopting essentially the position now urged by the Service, ruled that since the aliens had



serve an immigrant's "status of a permanent resident in the United States." The Act, however, defines the terms "permanent" and "residence" as an individual's "principal actual dwelling place in fact without regard to intent" on a "continuing or lasting" basis. (See 8 U.S.C. §§ 1101(a)(31) & (33).) Thus, this fiction could not be squared with the Act, and was abandoned after being rejected in *Amalgamated Meatcutters* v. *Rogers*, 186 F. Supp. 114 (D.D.C.), in favor of the rationalization presented in the brief for the Federal Parties filed with this Court.

been lawfully admitted for permanent residence, they were entitled to use the Form I-151 as long as the latter was valid—at that time as now one year. But the Board of Immigration Appeals reversed, holding that by being unemployed for six months the commuters had 'abandoned [their] status of permanent resident[s].' 8 I. N. Dec. at 213. Once again, therefore, the Service expressed its understanding that actual residence in the United States was essential to the commuter's status as an alien lawfully admitted for permanent residence but that the commuter's place of employment was such a residence.

"This view of the Act was also the Service's litigating position before Judge Youngdahl in the *Amalgamated Meat Cutters* case. *See* Memorandum in Support of Defendants' Motion to Dismiss at 10; Note, Aliens in the Fields, 21 Stan. L.Rev. 1750, 1755 (1969). But here the Service encountered a well-deserved rebuff. Judge Youngdahl pointed out that the Immigration Act itself defined 'residence' as a person's 'place of general abode * * * his principal, actual dwelling place in fact, without regard to intent.' 8 U.S.C. § 1101(a)(33). The language of the Act was obviously irreconcilable with any contention that a commuter's place of employment could constitute a residence. Judge Youngdahl therefore rejected the Service's position. 186 F.Supp. at 118-119.

"Faced with this check, the Service was obliged 'to reexamine the provisions of the 1952 Act, * * * and to adopt a new theory of the legal basis for the commuter practice.' Note, *supra*, 21 Stan.L.Rev. at 1757. Hence, when the commuter practice once again came under attack in Texas State AFL-CIO v. Kennedy, 117 U.S.App.D.C. 343, 330 F.2d 217 (1964), the Service was ready with the theory it now advances—that the commuter was not required to establish any residence in the United States, either fictitious or actual." (433 F.2d at 87-88.)

Second, the Act makes perfect sense so long as the privilege of entry without the necessity of presenting a visa granted in § 1181(b) is limited to true resident immigrants; in contrast the court below recognized that:

> "As Judge Wright so persuasively pointed out in his dissenting opinion in the *Gooch* case, the construction of 'lawfully admitted for permanent residence' as including commuters 'makes nonsense of the Congressional policy embodied in no fewer than five sections of the Act entirely apart from § 1101(a)(27)(B), and is contrary to the plain meaning of two others.'" (481 F.2d at 843; footnote omitted.)

Once again, for the Court's convenience, at this point we set out in full in the margin, and despite its length, a portion of Judge Wright's dissent in *Gooch*—in this instance his masterful exposition of the absurdities which follow from the Attorney General's litigating position as to the meaning of § 1101(a)(20).[7] The Attorney General's sole

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[7]

> "Take first § 1182(h) and § 1182(i). These sections provide for waiver by the Attorney General, under certain circumstances, of the ban against entry of aliens who have been convicted of a crime or who have procured entry documents by fraud. In both cases the Attorney General may grant waiver only if the alien is the spouse, child, or parent of 'a United States citizen or of an alien lawfully admitted for permanent residence.' If an alien lawfully admitted for permanent residence is taken to be one who actually resides or actually intends to reside in the United States, then the sections embody a humanitarian, family-maintaining policy for residents of the United States. But I can think of no reason why Congress would choose to extend favored treatment, for example, to a Mexican convicted of a crime, simply because he was the parent of a commuter resident in Tijuana.
>
> "Or take § 1182(a)(14). Read together with § 1101(a)(27)(A), the effect is to provide that a Mexican laborer seeking to enter the United States as a special immigrant (*not* as a commuter) must receive Labor Department certification unless he is the parent, child, or spouse of a United States citizen or of an alien lawfully admitted for permanent residence. Once again, this is a sensible and humanitarian policy if the laborer's relatives actually reside in the United States. But why would Congress want to allow a Mexican laborer into the country as a special immigrant without certification, simply because his son is a commuter—by definition a resident of Mexico?
>
> "There are similar examples in other contexts. Thus § 1153(a)(2) awards second preference visas to the spouse, unmarried son or unmarried daughter of an alien lawfully admitted for permanent residence. No doubt few visas would be awarded to commuter families under this provision, since immigrants born in the Western Hemisphere are exempt from the numerical limitations on entry. § 1153(a). But it remains hard to see why Congress would want to give special preference to the children born abroad of parents who emigrate to Canada or Mexico and become commuters.
>
> "Finally, § 1251(f) forbids the deportation of an alien who procured entry by fraud, if he is the spouse, parent, or child of a citizen or of an alien lawfully admitted for permanent residence. Would this court really construe § 1251(f) as forbidding the deportation of a Mexican who had procured entry by fraud, simply because he had a son who was a commuter resident in Tijuana? I cannot believe we would, but if the majority opinion is correct we would be obliged to.
>
> "So far I have discussed only the untoward consequences for other sections of the Act that flow from the majority's actual holding in this case—that commuters are lawfully admitted for permanent residence. The reasoning of the majority, however, leads to consequences still more absurd than the actual holding.
>
> "The majority argues that commuters are lawfully admitted for permanent residence simply because 'each of them at one time received a valid immigration visa.' If this is correct, it follows that all of the thousands of people, all over the world, who have ever received a valid immigration visa, also qualify as aliens lawfully admitted for permanent residence. Such aliens would not of course be commuters, since never having come to this country they could not be said to be 'returning from a temporary visit abroad' and would be ineligible to use Form I-151 as an entry document. But since according to the majority they were lawfully admitted for



response is:

> "Whether the statutory phrase [defined in § 1101(a)-(20)] must be read to include commuters in contexts other than the commuter's status for purposes of readmission to the United States has not been presented to

the Service and need not be resolved in this case. The interpretation of the phrase in other sections of the Act will, of course, depend upon the legislative purpose expressed by those sections." (Fed. Parties' brief, p. 28.)

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permanent residence, they are entitled to the benefits which that status confers.

"Thus their relatives who have been convicted of crimes are entitled to specially favorable treatment. § 1182(h). Their relatives who enter this country by fraudulent means may not be deported. § 1251(f). If they were born in the Western Hemisphere, their relatives may enter as special immigrants without certification by the Secretary of Labor. § 1182(a)(14). Most startling of all, the unmarried sons and daughters of such aliens are entitled to second preference visas even though the alien himself might have been eligible for no preference whatsoever. And all these consequences follow even if the alien 'lawfully admitted' never leaves his homeland. If Congress intended such a result, it chose an odd way of saying so.

"Two other sections of the Act also suggest strongly that the majority is incorrect in making 'lawfully admitted for permanent residence' turn solely on the fact that an immigration visa was issued without regard to the residence or intended residence of the alien. The first is § 1182(g). That section grants privileges to the parent or unmarried son or daughter of 'a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa.' If the majority position is correct, then the entire last phrase is surpulsage, since any alien who has been issued an immigrant visa is an alien lawfully admitted for permanent residence. Congress, however, seems to have thought the categories distinct.

"Second is the definition of the border-crossing card in § 1101(a)(6). The statute there distinguishes between an 'alien lawfully admitted for permanent residence' and an 'alien resident in foreign contiguous territory.' If one accepts the Service's construction of 'lawfully admitted for permanent residence,' I suppose that it is possible to give some meaning to the second phrase by construing it as applicable to nonimmigrants. But the question before us is precisely *whether* the Government's construction of the statute is correct. And, approaching § 1101(a)(6) with an open mind, it would certainly appear that the plain meaning of the words indicates that an 'alien lawfully admitted for permanent residence' is *not* an 'alien resident in foreign contiguous territory.'" (433 F.2d at 84-85.)



But, Judge Wright anticipated that response and provided the complete answer to it:

> "The authors of the Act took the trouble carefully to define the term, § 1101(a)(20), and stated that a precise definition was necessary since 'this term has especial significance because of its application to numerous provisions of the bill.' H.R. Rep. No. 1365, 82d Cong., 2d Sess., 1952 U.S. Cong. & Adm. News, pp. 1653, 1684. Congress could not have made clearer its intention that the term be give a uniform significance throughout the Act. We are thus not at liberty to adopt one meaning of 'lawfully admitted for permanent residence' in § 1101(a)(27)(B) and another in the other sections where the phrase appears: if commuters are lawfully admitted for permanent residence for purposes of § 1101(a)(27)(B), then they must be lawfully admited for [illegible]manent residence for purposes of all other sections of the Act." (433 F.2d at 83.)

What emerges from Judge Wright's anlaysis is that § 1181(b) is simply one manifestation of the special solicitude Congress has evinced throughout the Act for true resident immigrants who, as this Court has noted, have frequently "lived in this country for substantial periods" thereby "establishing strong * * * family, social and economic ties here * * *." (*Woodby* v. *Immigration Service*, 385 U.S. 276, 286.) A commuter, of course, does not have all of those ties that bind.

**2.** In apparent recognition that the language and structure of the 1952 Act are squarely contrary to his position the Attorney General places his main reliance on the proposition that the language of 8 U.S.C. § 1181(b)[8] is "similar

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[8] As passed in 1952 this provision authorized waiver of the visa requirement for "aliens lawfully admitted for permanent residence who depart from the United States temporarily." For the present language see p. 6 *supra*.

to that [of § 13(b) of the 1924 Act[9]] and obviously was designed to conform with the interpretation of the prior statute." (Fed. Parties' Br. pp. 32-33.) This is the statutory premise for his elaborate argument that Congress has "in effect * * * ratified" the commuter practice. (Fed. Parties' Br. pp. 39-63.) But the 1952 Act did not reenact § 13(b), it made a vital change in the exception to the visa requirement. Rather than according that special privilege to "immigrants who have been legally admitted," the 1952 Act accorded that privilege to immigrants "lawfully admitted for permanent residence," which term it defined with particularity. We have already discussed the ramifications of that definition, and have demonstrated that it requires the result for which the plaintiffs below contend. (Pp. 5-15, *supra*.)

We are, of course, well aware that construing statutes is not a grammar lesson or a scholastic exercise but rather an endeavor to ascertain the legislative will. (See, e.g., *Woodwork Mfrs. Assn.* v. *NLRB*, 386 U.S. 612, 619-620.) But when the language and structure of an act point in one direction surely the least that is required if the opposite direction is to be taken is some affirmative indication that Congress has not meant what the legislation it has passed appears to say. The approach consistent with reason is that where legislation in terms repudiates a prior administrative practice, that practice is thereby overruled unless there is some clear indication in the legislative history that Congress, nonetheless, did intend to preserve it. Otherwise the absence of legislative history *restating* that which is

[9] The 1924 Act waived the visa requirement for "immigrants who have been legally admitted to the United States and who depart therefrom temporarily."



plainly and unequivocally stated in the law becomes decisive. Placing such a burden of reiteration on the legislature would, of course, be an absurdity.

Thus, we believe that the decisive point here is that there is not a word in the 1952 Act, the House Report, the Conference Report or the debates which so much as imply a desire on the part of Congress to sanction the commuter practice. The Attorney General's brave statement that § 1181(b) "clearly was designed to conform with the interpretion of the prior statutes" (Fed. Parties Br. p. 33) is fatally lacking in any support in the legislative record.

He builds his case on the proposition that Congress has "in effect * * * ratified" the commuter practice (Fed. Parties Br. p. 39), but he fails to present any proof of that proposition—for there is none.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below in No. 73-300 should be affirmed and the judgment below in No. 73-480 should be reversed.

Respectfully submitted,

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